

July 1985

## Montana's Legislative Attempt to Deal with the Drinking Driver: The 1983 DUI Statutes

Brendon J. Rohan  
*University of Montana School of Law*

Follow this and additional works at: <https://scholarship.law.umt.edu/mlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Brendon J. Rohan, *Montana's Legislative Attempt to Deal with the Drinking Driver: The 1983 DUI Statutes*, 46 Mont. L. Rev. (1985).  
Available at: <https://scholarship.law.umt.edu/mlr/vol46/iss2/6>

This Comment is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized editor of The Scholarly Forum @ Montana Law.

# MONTANA'S LEGISLATIVE ATTEMPT TO DEAL WITH THE DRINKING DRIVER: THE 1983 DUI STATUTES

Brendon J. Rohan

## I. INTRODUCTION

Drinking alcohol and driving a motor vehicle is a problem of national<sup>1</sup> and state<sup>2</sup> concern. In the spring of 1982, President Ronald Reagan established a presidential commission to combat what he termed an "epidemic" of drunk driving on this nation's roadways.<sup>3</sup> This commission was a catalyst, stimulating a grassroots response to the problem of the drinking driver. A comprehensive approach, emphasizing deterring the drunk driver through integration and coordination of enforcement, prosecution, adjudication, education, and treatment was recommended.<sup>4</sup> The foundation of this type of program is community-based citizen support. The ultimate goal of this effort was to change societal attitudes<sup>5</sup>

---

1. According to a 1978 government report, traffic accidents were the greatest cause of violent death in the United States. Approximately one-third of the injuries and one-half of the deaths resulting from these accidents were alcohol related. U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, THIRD SPECIAL REPORT TO THE U.S. CONGRESS ON ALCOHOL AND HEALTH 233 (1978) [hereinafter cited as ALCOHOL AND HEALTH]. In 1981, 50,000 people were killed on the nation's highways. Drunk drivers were involved in one-half of these fatalities and were responsible for 750,000 injuries. *President Establishes Commission on Drinking and Driving*, 7 ALCOHOL HEALTH AND RESEARCH WORLD 2 (1982) [hereinafter cited as ALCOHOL WORLD]. The economic loss due to alcohol-related accidents exceeds \$5 billion annually and over \$5 million is expended yearly to prosecute drunk drivers. Bradbury, *The Random Killers*, 17 THE PROSECUTOR 5 (1982). The United States Supreme Court has recognized the "carnage caused by drunk drivers" in referring to the strong public policy in enforcing drunk driving laws. *South Dakota v. Neville*, 459 U.S. 553, 558 (1983).

2. Only cancer and heart disease were responsible for more deaths among Montana's adult population than drunk driving. *Hearings on H.B. 540 Before the House Judiciary Comm.*, 48th Leg. (Feb. 10, 1983) (statement of Colonel Bob Landon of the Highway Patrol Division) [hereinafter cited as *Hearings H.B. 540 Before House*]. In 1981, 20 percent of all traffic fatalities involved teenagers. Fifty-five percent of these teenage deaths involved the use of alcohol. In 1982, these statistics had risen to 22 percent and 60 percent respectively. Exhibit P, *Hearings on H.B. 250 Before the House Judiciary Comm.*, 48th Leg. (Jan. 26, 1983) [hereinafter *Hearings H.B. 250 Before House*]. Drunk driving was the fourth leading cause of accidents in Montana in 1982. Exhibit J, *Hearings on H.B. 250 Before the Senate Judiciary Comm.*, 48th Leg. (Mar. 9, 1983) [hereinafter *Hearings H.B. 250 Before Senate*].

3. ALCOHOL WORLD, *supra* note 1, at 2.

4. *Id.*

5. Although there has been a societal recognition of the problem, there also has been a reluctance to deal effectively with the drinking driver because of either apathetic or empathetic feelings toward the drunk driver. "The public must be disabused of the notion that laws prohibiting drunk driving contain more thunder than lightening." Bradbury, *supra* note 1, at 5. "Public officials responsible for administering the drunk-driving laws of this country for too long have approached the drinking driver problem with the pitiful cop-out,

toward drinking and driving through long-term prevention and education.

The 1983 Montana Legislature, responding to societal<sup>6</sup> and monetary pressures,<sup>7</sup> adopted new and stricter laws to deal with the drunk driver. Specifically, this new legislation extended enforcement jurisdiction; provided faster and stiffer "implied consent" administrative penalties; imposed mandatory jail sentences for convicted drunk drivers; and recognized a "per se" driving of-

'there, but for the grace of God, go I.' " Yelverton, *Alcoholism Is a Disease—Driving Drunk Is a Crime*, 17 THE PROSECUTOR 4 (1982).

6. According to a federal study of 25 states completed in early 1981, 15 of the surveyed states passed drunk driving legislation that either mandated stricter sanctions for the convicted drunk driver or which plugged existing loopholes in their statutes to ensure more consistent enforcement. Hall & Quinlan, *Adjudication of Driving While Intoxicated Laws Overview: Problems and Needs*, 17 THE PROSECUTOR 11, 13 (1982). The National Safety Council reported that in the first three months of 1982, 30 states and the District of Columbia introduced or enacted legislation intended to address the problem of drinking and driving. *Legislative Approaches to Reducing DWI*, ALCOHOL WORLD, *supra* note 1, at 19. See also Exhibit E, *Hearings on H.B. 540 Before the Senate Judiciary Comm.*, 48th Leg. (Mar. 23, 1983) [hereinafter *Hearings H.B. 540 Before Senate*], "You will be taking a giant step forward for the people of Montana if you pass [this legislation]." "[I]t will be a strong message to the public and individual drivers that drunk driving will not be tolerated in Montana." Exhibit D, *Hearings on S.B. 313 Before the Senate Judiciary Comm.*, 48th Leg. (Feb. 4, 1983) [hereinafter *Hearings S.B. 313 Before Senate*].

7. If the State of Montana passed drunk driving laws in conformity with federal standards, a substantial amount of federal monetary assistance would become available to enforce these laws and to establish programs aimed at prevention and treatment. 23 U.S.C. § 408(a) (1982). See 23 U.S.C. § 408(e)(1) (1982), providing in relevant part that money would be available if the following conditions were met:

(A) for the prompt suspension, for a period not less than ninety days in the case of a first offender and not less than one year in the case of any repeat offender, of the driver's license of any individual who a law enforcement officer has probable cause under State law to believe has committed an alcohol-related traffic offense, and (i) to whom is administered one or more chemical tests to determine whether the individual was intoxicated while operating the motor vehicle and who is determined, as a result of such tests, to be intoxicated, or (ii) who refuses to submit to such a test as proposed by the officer;

(B) for a mandatory sentence, which shall not be subject to suspension or probation, of (i) imprisonment for not less than forty-eight consecutive hours, or (ii) not less than ten days of community service, of any person convicted of driving while intoxicated more than once in any five-year period;

(C) that any person with a blood alcohol concentration of 0.10 percent or greater when driving a motor vehicle shall be deemed to be driving while intoxicated; and

(D) for increased efforts or resources dedicated to the enforcement of alcohol-related traffic laws and increased efforts to inform the public of such enforcement.

Approximately \$300,000 per year for three years was available for training and equipment. Also, it was possible to receive an additional grant in the fourth year with federal approval. *Hearings on S.B. 313 Before the House Judiciary Comm.*, 48th Leg. (Mar. 11, 1983) [hereinafter cited as *Hearings S.B. 313 Before House*].

"The main thing involved in the federal money is related to training, publicity, and prevention." *Id.* See also 23 U.S.C. § 408(b) (1982).

fense. This comment focuses on the current Montana law on drinking and driving. The purposes of this comment are to inform the reader of the history of drunk driving legislation in Montana; to point out the major changes in Montana's drunk driving statutes that were mandated by the 1983 Legislature; and finally, to give some insight into the legislative thought behind these changes.

## II. PRE-1983 LEGISLATION

An early day editorial comment warned of the potential problems that would be associated with the development of the automobile and the automobile's imbibing operator:

The management of automobile wagons is far more dangerous for men who drink than the driving of locomotives on steel rails. Inebriates and moderate drinkers are the most incapable of all persons to drive motor wagons. The general palsy and diminished power of control of both the reason and senses are certain to invite disaster in every attempt to guide such wagons.<sup>8</sup>

Montana's lawmakers recognized as early as 1895 the inherent danger of a person consuming alcohol and taking control of a mobile vehicle. "Every person who is intoxicated while in charge of a locomotive engine . . . is guilty of a misdemeanor."<sup>9</sup> In 1903, the Montana Legislature passed a statute making it a crime to employ a person to convey passengers on any public highway or road if that person was "addicted to drunkenness."<sup>10</sup>

The first comprehensive laws directed at the drinking driver were enacted by the Montana Legislature in 1929.<sup>11</sup> These statutes made it a misdemeanor crime for a person to drink intoxicants and drive a motor vehicle on the public thoroughfares of the state.<sup>12</sup> The next major change in drunk driving laws did not take place until 1955. In that year, the Legislative Assembly set out a uniform compilation of statutes<sup>13</sup> regulating the operation of all motor vehi-

8. Bradbury, *supra* note 1, at 5 (citing a 1904 editorial).

9. MONT. CODES ANN. § 690 (1895).

10. 1903 Mont. Laws ch. 44, § 82. The historical context of this provision and the accompanying enactments suggest that this law was directed at the stagecoach and horse carriage driver. However, this law certainly would have been broad enough to cover the resourceful entrepreneur who conceived the idea of a motorized cab service.

11. 1929 Mont. Laws ch. 166.

12. *Id.* at § 1. This Act also defined the operation of a motor vehicle while under the influence of a narcotic drug as a crime. *Id.* That subject is beyond the scope of this article, but for informative source material on the subject, see Hackett, *Prosecution of "Driving Under the Influence of Drug Cases,"* 17 THE PROSECUTOR 19 (1982).

13. 1955 Mont. Laws ch. 263. The laws relating to the intoxicated driver were found at Art. IV, § 39 of the Act.

cles on the highways of the state. The 1957 Legislature substantially amended the 1955 enactments.<sup>14</sup> These amendments would serve as the foundation for drunk driving laws in Montana until 1983.

The 1957 drunk driving provisions, for the first time, acknowledged that the amount of alcohol present in a vehicle operator's blood would give rise to certain presumptions similar to the current 1983 codifications.<sup>15</sup> The one exception was that legal intoxication was presumed at a blood alcohol concentration (BAC) of 0.15%<sup>16</sup> rather than the present 0.10% level. In 1971, the statutes were amended to reduce the legal intoxication presumption to 0.10%.<sup>17</sup>

An "implied consent"<sup>18</sup> proviso was added to Montana's drunk driving statutory scheme in 1971.<sup>19</sup> Under the implied consent section, a suspected drunk driver who refused a chemical analysis of his blood, breath, or urine was subject to suspension of his driving privileges. This provision, although substantially modified, was carried over in the 1983 laws.<sup>20</sup>

Sentencing of the convicted drunk driver was addressed by the 1977 Legislature. A mandatory ten day jail term was prescribed for a driver convicted of a third or subsequent offense of DUI.<sup>21</sup> This same legislative session, however, softened this position. Judges were granted discretionary authority to suspend any sentence imposed by the DUI statutes if the offender successfully completed a court-approved driver improvement or alcohol treatment program.<sup>22</sup> This legislation recognized what has been termed as the "health-legal" approach<sup>23</sup> to drunk driving. Also, in 1979, a "con-

14. See 1957 Mont. Laws ch. 194.

15. MONT. CODE ANN. § 61-8-401(3) (1983) provides that if a vehicle operator has a BAC of 0.05% or less it will be presumed that the person is not under the influence of alcohol; if the person's BAC is between 0.05% and 0.10% there is no presumption of intoxication but the BAC may be considered as competent evidence of guilt or innocence; a BAC of 0.10% or above gives rise to a presumption that the vehicle operator was under the influence of alcohol.

16. 1957 Mont. Laws ch. 194, § 1(b)(3).

17. 1971 Mont. Laws ch. 132, § 1(b)(3).

18. For a critical analysis of implied consent legislation, see generally Note, *Implied Consent Legislation in Drunk Driving Cases: The Case for Repeal—People v. Moselle, People v. Daniel, People v. Wolter*, 57 N.Y.2d 97, 439 N.E.2d 1235, 454 N.Y.S.2d 292 (1982), 6 WESTERN NEW ENG. L. REV. 465 (1983).

19. 1971 Mont. Laws ch. 131.

20. MONT. CODE ANN. § 61-8-402(3) (1983).

21. 1977 Mont. Laws ch. 289.

22. *Id.* at ch. 430.

23. Studies have shown that an alcoholic is 21 times more likely to cause a fatal accident than a moderate drinker. ALCOHOL AND HEALTH, *supra* note 1, at 240. The Montana legislators in 1983 were presented with documentary materials showing a link between

viction" was defined so as to limit its application for sentence enhancement purposes to five years.<sup>24</sup> The 1981 Legislature made the completion of an alcohol information course mandatory for any convicted drunk driver regardless of any other punishment provided by statute.<sup>25</sup>

### III. DRIVING UNDER THE INFLUENCE—THE OFFENSE AFTER 1983

A violation of Montana's current DUI statute occurs if a person is: (1) under the influence of alcohol;<sup>26</sup> (2) driving or in actual physical control of a motor vehicle;<sup>27</sup> and (3) operating the motor vehicle on "ways of the state open to the public."<sup>28</sup>

#### A. Intoxication

"Under the influence" is a question of fact<sup>29</sup> describing the level of driving impairment that alcohol consumption must cause in order to secure a DUI conviction. The particular wording of a DUI statute is generally held to be determinative in deciding if a driver has reached a proscribed level of impairment. In Montana, a driver is criminally culpable if his intoxication affects in the "slightest degree" his ability to operate a motor vehicle.<sup>30</sup> Factors that have been held to support a finding of intoxication include:

drunk driving and alcoholism. Exhibit D, *Hearings S.B. 313 Before Senate*, *supra* note 6 (Feb. 4, 1983). See also comments of the National Council on Alcoholism, Inc. in *Perspectives: An Interview Feature*, ALCOHOL WORLD, *supra* note 1, at 10.

24. 1979 Mont. Laws ch. 56. "Conviction" for purposes of drunk driving was to have the generic definition found at MONT. CODE ANN. § 45-2-201 (1983) and additionally would apply to the forfeiture of bail or security deposited to secure the defendant's presence. *Id.*

25. 1981 Mont. Laws ch. 451.

26. The influence of drugs on a person's ability to safely operate a motor vehicle is covered by subsections (b) and (c) of MONT. CODE ANN. § 61-8-401(1) (1983). The 1983 Montana Legislature added a new provision, subsection (d), to deal with the vehicle operator who is under the influence of a combination of drugs and alcohol. 1983 Mont. Laws ch. 698 § 5. These topics are beyond the scope of this article.

27. A "motor vehicle" includes every vehicle propelled by its own power and designed primarily to transport persons or property on the highways of this state. MONT. CODE ANN. § 61-1-102 (1983). A bicycle is excluded from the definition of motor vehicle. *Id.* The traffic regulation statute, however, recognizes that a bicycle operator is granted the same rights and duties as any other operator of a motor vehicle, MONT. CODE ANN. § 61-8-602 (1983); therefore, one could argue that the DUI provisions are applicable to the bicycle rider.

28. MONT. CODE ANN. § 61-8-401(1)(a) (1983). This phrase has a defined meaning that will be discussed in detail in the text of this article. See *infra* text accompanying notes 48-53.

29. *State v. Medicine Bull*, 152 Mont. 34, 39, 445 P.2d 916, 919 (1968).

30. In *State v. Cline*, 135 Mont. 372, 339 P.2d 657 (1959), the Montana Supreme Court specifically approved an instruction that defined "under the influence" to be proved "[i]f the ability of the driver of an automobile has been lessened in the slightest degree by use of intoxicating liquors . . ." *Id.* at 379, 339 P.2d at 662 (emphasis added).

testimony as to the actual amount of alcohol consumed, the smell of liquor, glassy eyes, and unstable or clumsy locomotion;<sup>31</sup> testimony of observers, particularly trained observers such as law enforcement officers, doctors, and nurses;<sup>32</sup> confusion, disorientation, and unresponsive and incoherent answers to questions;<sup>33</sup> and slurred speech and admissions by the defendant about how much alcohol he has ingested.<sup>34</sup>

The majority of the above intoxication indicators are passive, i.e., they require no active participation by the driver. Formal observations or on the scene testing procedures are also probative indicators of an intoxicated condition. Field sobriety testing is a psycho/physical evaluation of a driver's capacity to perform dictated maneuvers involving physical coordination.<sup>35</sup> These tests also assess the driver's ability to clearly understand and follow directions.<sup>36</sup> The Montana Supreme Court has held that field sobriety testing is not a search and therefore does not enjoy any federal or state constitutional protection.<sup>37</sup> Additionally, an arresting law enforcement officer is under no duty to inform a suspected drunk

31. *State v. Cook*, \_\_\_ Mont. \_\_\_, 645 P.2d 1367, 1370 (1982); *Medicine Bull*, 152 Mont. at 38, 445 P.2d at 919.

32. *State v. Taylor*, \_\_\_ Mont. \_\_\_, 661 P.2d 33 (1983); *State v. Rumley*, \_\_\_ Mont. \_\_\_, 634 P.2d 446 (1981); *State v. Souhrada*, 122 Mont. 377, 204 P.2d 792 (1949).

33. *Rumley*, \_\_\_ Mont. at \_\_\_, 634 P.2d at 447.

34. *Cook*, \_\_\_ Mont. at \_\_\_, 645 P.2d at 1370. See also COLORADO ASSOCIATION OF CHIEFS OF POLICE, D.U.I. ENFORCEMENT MANUAL FOR THE STATE OF COLORADO 3-5 (1980) [hereinafter cited as D.U.I. MANUAL], for a listing of observable behaviors a law enforcement officer is trained to recognize as indicators of intoxication.

35. The "Romberg test" is a measure of intoxication based on a particular swaying pattern after a person has been instructed to assume a rigid upright position with his head tilted back and eyes closed. The law enforcement officer concentrates on a focal point on the person's body for approximately 15 seconds. Any kind of bodily circular movement is considered a negative result. A front to rear or side to side swaying motion is a positive indicator of intoxication. Walking a straight line, finger to ear or nose, and one leg balance are also tests of physical coordination. See D.U.I. MANUAL, *supra* note 34, at 19-20; L. TAYLOR, DRUNK DRIVING DEFENSE § 4.1.11, at 195-201 (1981). The newest field testing procedure that is being used on a limited basis in Montana is gaze nystagmus. This test measures the movement of the eyes. A person under the influence of alcohol will develop a jerking movement of the eye sooner than a sober person. This test is now part of the Montana Law Enforcement Academy's curriculum. It is being used by some members of the Missoula County Sheriff's Office and a few state highway patrolman based in the Missoula region. *Lawmen crack down to get drunks off road*, Missoulian, Dec. 13, 1984, at 9. Gaze nystagmus also is used currently on an experimental basis in California, Colorado, and Florida. TAYLOR, *supra* note 35, § 4.1.14a, at 88-94 (Supp. 1984).

36. A law enforcement officer may evaluate a person's ability to understand directions at the time he is explaining the physical coordination movements. Also, a suspected drunk driver may be asked to recite the alphabet (the law enforcement officer first should be sure the person has the educational background to know the alphabet) or to reverse count. TAYLOR, *supra* note 35, § 4.1.14, at 200.

37. *State v. Purdie*, \_\_\_ Mont. \_\_\_, 680 P.2d 576, 578 (1984).

driver that the driver need not participate in the testing.<sup>38</sup>

The final indicator of intoxication is the chemical test result of of the suspect's blood, breath, or urine. Prior to 1983, alcohol concentration was measured solely in terms of grams of alcohol per 100 cubic centimeters of blood.<sup>39</sup> The 1983 Montana Legislature expanded the definition of alcohol concentration to include the amount of alcohol in a particular sample of breath or urine.<sup>40</sup> An alcohol concentration of 0.10% or greater raises the presumption that the person is under the influence of alcohol.<sup>41</sup> Apparently in response to decisions by the United States and the Montana Supreme Courts, the 1983 Legislature specifically modified this presumption, making it rebuttable.<sup>42</sup>

### B. *Physical Control of a Motor Vehicle*

The phrase "driving under the influence" is somewhat of a misnomer because there is no requirement that a person must actually be driving a motor vehicle to commit the offense of DUI.<sup>43</sup> The person need only be in "actual physical control" of a motor vehicle.<sup>44</sup> Actual physical control has been defined by the Montana Supreme Court as "existing or present bodily restraint, directing influence, domination, or regulation of an automobile."<sup>45</sup> The Montana court has sustained a finding of actual physical control when the driver of a vehicle was asleep or passed out in an automobile that was stuck in a borrow pit and was incapable of moving.<sup>46</sup> The court emphasized that in this situation the driver had not relin-

38. *Id.* at \_\_\_\_, 680 P.2d at 579.

39. See, e.g., MONT. CODE ANN. § 61-8-401(3), (4) (1981) (amended 1983).

40. 1983 Mont. Laws ch. 698, § 7 (codified at MONT. CODE ANN. § 61-8-407 (1983)). Alcohol concentration now can be determined according to the number of grams of alcohol per 210 liters of breath, or 75.3 milliliters of urine. *Id.*

41. MONT. CODE ANN. § 61-8-401(3)(c) (1983).

42. 1983 Mont. Laws ch. 698, § 5 (codified at MONT. CODE ANN. § 61-8-401(3)(c) (1983)). In *Sandstrom v. Montana*, 442 U.S. 510 (1979), the United States Supreme Court held that a conclusive presumption in a criminal action had the effect of unconstitutionally shifting the burden of persuasion to the defendant. *Id.* at 523-24. The Montana Supreme Court applied similar reasoning in *City of Missoula v. Shea*, \_\_ Mont. \_\_\_\_, 661 P.2d 410 (1983), to hold that a prima facie criminal presumption is unconstitutional. *Id.* at \_\_\_\_, 661 P.2d at 414.

43. See *State v. Ruona*, 133 Mont. 243, 248, 321 P.2d 615, 618 (1958) (movement of a vehicle is unnecessary to charge DUI).

44. MONT. CODE ANN. § 61-8-401(1)(a) (1983).

45. *Ruona*, 133 Mont. at 248, 321 P.2d at 618.

46. *Taylor*, \_\_ Mont. at \_\_\_\_, 661 P.2d at 34. *Contra Arizona v. Zavala*, 136 Ariz. 356, 358-59, 666 P.2d 456, 458-59 (1983). See also IDAHO CODE § 49-1102(6) (Supp. 1983) (repealed 1984) which provides that a person is in actual physical control of a motor vehicle if that person is "in the driver's position with the motor running or with the motor vehicle moving."



quished regulation or control over the vehicle.<sup>47</sup> The Montana Supreme Court has thus demonstrated that it will construe the actual physical control element of a DUI charge liberally.

### C. Geographic Application

The present DUI statutes are enforceable in all publicly travelled areas. Where Montana's DUI statutes should apply was the subject of considerable debate during the 1983 legislative session. The 1955 enactment of uniform traffic laws made the DUI laws enforceable on "highways and elsewhere throughout the state."<sup>48</sup> In 1979, during recodification from the Revised Codes of Montana to the Montana Code Annotated, enforcement jurisdiction was limited to the highways of this state. This change caused considerable problems in the enforcement<sup>49</sup> of the DUI laws and the prosecution<sup>50</sup> of the drinking driver.

The 1983 Montana Legislature responded to this problem by extending the applicability of the DUI statutes to the "ways of the state open to the public."<sup>51</sup> This phrase encompasses all highways, roads, alleys, lanes, parking areas, or other public places adopted and fitted to public travel and that are in common use by the public.<sup>52</sup> It was estimated that this single change in the DUI statutes would account for a ten percent increase in DUI arrests.<sup>53</sup> All statutory DUI provisions were conformed to adopt this new geographic enforcement definition.

47. *Taylor*, \_\_\_\_ Mont. at \_\_\_\_, 661 P.2d at 34.

48. 1955 Mont. Laws ch. 263, § 22. In 1971, the Montana Highway Patrol and state sheriffs were given the authority to enforce DUI laws on forest development roads. 1971 Mont. Laws ch. 139, § 2.

49. See, e.g., *Hearings on S.B. 260 Before the Senate Judiciary Comm.*, 48th Leg. (Jan. 27, 1983) [hereinafter cited as *Hearings S.B. 260*] (Colonel Landon of the Montana Highway Patrol testified that his department receives numerous complaints of drunk drivers in areas where his officers have no jurisdiction); *Hearings S.B. 260* (Mar. 11, 1983) (Betty Wing, Missoula Deputy County Attorney, expressed concern about drunk drivers in public parks, on the University of Montana campus, or on lands not open to the public). Under the pre-1983 language a drunk driver in a K-Mart lot could not be arrested. *Id.* (statement of Senator Halligan).

50. See Exhibit D, *Hearings on S.B. 260 Before the House Judiciary Comm.*, 48th Leg. (Mar. 11, 1983) (Jim Nugent, Missoula City Attorney, complained about the prosecution problems he had encountered since the 1979 change). The Montana Supreme Court had to struggle with the definition of "highway" to reach its result in *Taylor*, \_\_\_\_ Mont. at \_\_\_\_, 661 P.2d at 35. How a state statute defines "highway" is an important consideration in the formulation of a defensive strategy to a DUI charge. TAYLOR, *supra* note 35, § 1.1.3 at 16-17.

51. 1983 Mont. Laws ch. 659 and 698 (codified at MONT. CODE ANN. § 61-8-101(1) (1983)).

52. MONT. CODE ANN. § 61-8-101(1) (1983).

53. Fiscal Note, *Hearings S.B. 260*, *supra* note 49 (Jan. 28, 1983).

### D. Implied Consent

Under implied consent provisions, the law assumes that an operator of a motor vehicle, who is suspected of being under the influence of alcohol, has consented to a chemical test to determine if alcohol is present within his body. The driver may refuse to participate in the testing procedure. This refusal, however, may subject the driver to the administrative sanction of suspension or revocation of his driving privileges.<sup>54</sup>

Montana's implied consent statute<sup>55</sup> was expanded and restructured by the 1983 Legislature.<sup>56</sup> This major statutory overhaul was a legislative attempt to encourage suspected drunk drivers to submit to a chemical test of their blood, breath, or urine.<sup>57</sup> Because these tests can produce incriminating evidence for the prosecution's case, this legislation received support from the Department of Justice and prosecutors.<sup>58</sup>

A prerequisite to the testing procedure is a valid arrest.<sup>59</sup> An exception to the valid arrest requirement exists when the driver is "unconscious or . . . otherwise in a condition rendering him incapable of refusal."<sup>60</sup> The meaning of this latter phrase has been the subject of considerable controversy. The Montana Supreme Court applies the standard set forth in *State v. Mangels*<sup>61</sup> to determine if a driver's condition renders him incapable of consent. This standard of incapacity is judged by the best evidence that is reasonably available to the law enforcement officer.<sup>62</sup> In *Mangels*, evidence of the defendant's confused mental state coupled with minor injuries

---

54. MONT. CODE ANN. § 61-5-206 (1983) empowers the Division of Motor Vehicles to suspend or revoke driver's licenses.

55. MONT. CODE ANN. § 61-8-402 (1983).

56. 1983 Mont. Laws ch. 602.

57. Sarah Power of the Montana Attorney General's Office testified that the implied consent legislation was the key to the entire drunk driving legislation. She noted that two other bills set up stringent driving standards and tough penalties, but that "[w]ithout a similar increase in the implied consent area, more and more individuals will refuse the test in an attempt to avoid the stiffer criminal and administrative penalties which accompany DUI charges. That occurrence would nullify the entire war currently being waged on drinking and driving." Exhibit C, *Hearings S.B. 313 Before Senate, supra* note 6 (Feb. 4, 1983).

58. "The Department [of Justice] believes that by increasing the penalty substantially an individual will be less likely to refuse to submit to a chemical test." *Hearings S.B. 313, supra* note 57. Jim Nugent expressed the view that increasing implied consent penalties would facilitate the prosecution of offenders because fewer persons would be as likely to refuse to submit to the tests. Exhibit B, *Hearings S.B. 313 Before House, supra* note 7 (March 11, 1983).

59. *State v. Campbell*, \_\_\_ Mont. \_\_\_, 615 P.2d 190, 194 (1980).

60. MONT. CODE ANN. § 61-8-402(2) (1983).

61. 166 Mont. 190, 531 P.2d 1313 (1975).

62. *Id.* at 194, 531 P.2d at 1315.

from an automobile accident were not sufficient indicia to convince the Montana court that Mangels was incapable of giving consent.<sup>63</sup> In more recent cases, the Montana Supreme Court has accepted evidence of incoherence and confusion combined with serious physical injury to sustain a finding of inability to render consent.<sup>64</sup> A liberal interpretation of this standard was enunciated in *State v. Morgan*.<sup>65</sup> Although the defendant was conscious and apparently coherent and able to respond to questions, Morgan's doctor determined that his physical condition was serious enough to refuse the law enforcement officer's request to talk with Morgan. The Montana court upheld the use of Morgan's BAC results based on the doctor's determination that Morgan was in a condition rendering him incapable of refusing consent.<sup>66</sup>

The fact that a person refused to submit to a chemical test may now be used as evidence in the prosecution's case.<sup>67</sup> This is the result of a protracted legal battle that eventually made its way to the United States Supreme Court.<sup>68</sup> The Montana Supreme Court now holds that the use of this evidence is not proscribed by Montana's constitutional prohibition against self-incrimination.<sup>69</sup>

When a suspected drunk driver refuses to submit to a chemical test, a law enforcement officer may now seize his driver's license on behalf of the Montana Motor Vehicle Division.<sup>70</sup> A temporary seventy-two hour driving permit will be issued to the driver

63. *Id.* at 193, 531 P.2d at 1315.

64. *See, e.g., Rumley*, \_\_\_\_ Mont. \_\_\_\_, 634 P.2d 446; *Campbell*, \_\_\_\_ Mont. \_\_\_\_, 615 P.2d 190.

65. \_\_\_\_ Mont. \_\_\_\_, 646 P.2d 1177 (1982).

66. *Id.* at \_\_\_\_, 646 P.2d at 1180.

67. *See* MONT. CODE ANN. § 61-8-404(2) (1983).

68. The Montana Supreme Court, in a 4-3 decision, held that the use of evidence of a defendant's refusal to submit to a breathalyzer test was a violation of a defendant's constitutional right against self-incrimination. *State v. Jackson*, 195 Mont. 185, 192, 637 P.2d 1, 5 (1981). A petition for writ of certiorari was granted by the United States Supreme Court. *Montana v. Jackson*, 460 U.S. 1030 (1983). The Montana judgment was vacated and the case was remanded to determine if the Montana judgment was based on federal or state constitutional grounds. *Id.* If the judgment was not based on state constitutional protections, the Montana court was to consider the *Jackson* case in light of *South Dakota v. Neville*, 459 U.S. 553 (1983). In *Neville*, the Court held that the use of evidence of a refusal to submit to a breath test was not a constitutional violation. *Id.* at 924.

69. On remand the Montana court held that the earlier *Jackson* decision was based on federal rather than independent state grounds. *State v. Jackson*, \_\_\_\_ Mont. \_\_\_\_, 672 P.2d 255, 258 (1983). Consequently, Montana's "constitutional prohibition against self-incrimination [was] not offended by the admission in evidence of defendant's refusal to submit to a breathalyzer sobriety test." *Id.* at \_\_\_\_, 672 P.2d at 260. Justice Shea strongly protested, stating that he believed Article II, § 25 of the Montana Constitution had been violated, "and that is what I thought we held in *Jackson I.*" *Id.* at \_\_\_\_, 672 P.2d at 262 (Shea, J., dissenting).

70. MONT. CODE ANN. § 61-8-402(3) (1983).

by the arresting officer.<sup>71</sup> The officer then must submit a sworn report to the motor vehicle division detailing the circumstances of the refusal.<sup>72</sup> On a first refusal, the division will suspend the driver's license for ninety days. If the refusal was within five years of a previous refusal, the driver's license will be revoked for a period of one year. In either case there is no opportunity during the suspension or revocation period for the driver to obtain a restricted probationary or occupational driver's license.<sup>73</sup>

A person who has had his driver's license suspended or revoked under this provision has the right to appeal the revocation or suspension to state district court.<sup>74</sup> The United States Supreme Court has upheld pre-hearing driver's license suspension statutes like Montana's against constitutional due process attacks.<sup>75</sup> In *Mackey v. Montrym*,<sup>76</sup> the Court set out a three part balancing test<sup>77</sup> to evaluate the validity of such a statute. The Court went on to hold that the summary suspension of the driver's license of a person who refused to submit to a breath analysis test was justified by the compelling interest a state has in highway safety.<sup>78</sup>

Two changes were made in the suspension or revocation appeal process by the 1983 Legislature. Alternative forums are now available to petition for a hearing on the suspension or revocation, i.e., the district court in the county either of the person's residence or in which the arrest was made.<sup>79</sup> Also, a more expedient review of

---

71. *Id.* at § 61-8-402(4). The 72 hour period begins at the moment of arrest and issuance of the temporary permit.

72. *Id.* at § 61-8-402(3).

73. *Id.* at § 61-8-402(5). The suspension or revocation period begins on the date the officer's sworn report is received by the motor vehicle division.

74. MONT. CODE ANN. § 61-8-403 (1983).

75. In *Dixon v. Love*, 431 U.S. 105 (1977), an Illinois statute authorized the Secretary of State to suspend or revoke a driver's license without a preliminary hearing if there was a sufficient showing that the driver fell into any of 18 enumerated categories. The Court upheld the validity of this statute: "[T]he public interests present . . . are sufficiently visible and weighty for the State to make its summary initial decision effective without a predecision administrative hearing." *Id.* at 115. Cf. MONT. CODE ANN. § 61-5-205, -206 (1983).

76. 443 U.S. 1 (1979).

77. The Court, citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), described the balancing test: (1) the private, individual interest is affected by the official action; (2) the likelihood of the erroneous deprivation of a private interest as a consequence of the summary procedure; (3) the governmental function involved, the state interest served, and the administrative and fiscal burden resulting from the summary procedure. *Mackey*, 443 U.S. at 17.

78. *Mackey*, 443 U.S. at 19.

79. 1983 Mont. Laws ch. 602, § 2 (codified at MONT. CODE ANN. § 61-8-403 (1983)). This change apparently was meant to benefit a person, e.g., a college student, who was arrested for DUI in a place other than his own county of residence. See *Hearings S.B. 313 Before Senate*, *supra* note 6 (Mar. 22, 1983).

the suspension or revocation now is mandated.<sup>80</sup> The issuance of the seventy-two hour temporary driving permit should allow a person sufficient time to get into court and to ask for a stay order pending his challenge. The issues to be considered by the district court—probable cause, valid arrest, and refusal—remain the same.<sup>81</sup>

### E. *Per Se*

A *per se* drunk driving statute was passed by the 1983 Montana Legislature.<sup>82</sup> In a traditional DUI charge, intoxication generally is based on a behavioral test. A *per se* charge is chemically based. Under this statute, the results of a chemical analysis of a person's blood, breath, or urine are not simply treated as evidence from which a rebuttable presumption of intoxication may be drawn. Rather, the offense is merely having a BAC of 0.10% and being in control of a motor vehicle. The evidence becomes the crime itself.<sup>83</sup> Prosecutions are thereby expedited and defenses are few.

A primary concern of the legislators was that the *per se* statute created an unconstitutional presumption of intoxication.<sup>84</sup> Steve Johnson of the Montana Attorney General's Office, testifying in support of the *per se* bill, correctly pointed out that in a *per se* offense, there is no presumption. Mr. Johnson noted the presumption of intoxication only applies to a traditional DUI charge. Further, under the traditional charge, the chemical test corroborates the observed physical behavior of the defendant by the arresting officer. Alternatively, there are only two necessary elements of proof necessary to sustain a *per se* charge: (1) a person was driving or in actual physical control of a motor vehicle on the ways of this state open to the public and (2) that person had a BAC of 0.10% or greater.<sup>85</sup> *Per se* is not a subpart of the traditional DUI charge.<sup>86</sup> *Per se* is and was intended to be a separate and distinct offense.

*Per se* statutes have been unsuccessfully challenged in other

---

80. 1983 Mont. Laws ch. 698. Formerly, a hearing had to be held within 30 days after the county attorney received written notification of the request. MONT. CODE ANN. § 61-8-403 (1981). The 30 day period has now been shortened to 10 days. MONT. CODE ANN. § 61-8-403 (1983).

81. MONT. CODE ANN. § 61-8-403 (1983).

82. 1983 Mont. Laws ch. 698, § 4 (codified at MONT. CODE ANN. § 61-8-406 (1983)).

83. TAYLOR, *supra* note 35, § 5.2.1 at 120 (Supp. 1984).

84. *Hearings H.B. 540 Before House, supra* note 2 (Feb. 10, 1983) (Chairman Brown questioned the impact of the courts' decisions in *Sandstrom* and *Shea* on *per se* statutes).

85. *Id.* (statements of Steve Johnson).

86. MONT. CODE ANN. § 61-8-406 (1983).

jurisdictions. A Washington state defendant claimed per se statutes create an irrebuttable presumption violative of the due process and equal protection provisions of the Constitution.<sup>87</sup> The Washington Appeals Court determined that the state statutory scheme abolished the presumption and simply enumerates alternative methods of committing the offense of DUI.<sup>88</sup>

In *Burg v. Municipal Court*,<sup>89</sup> the California Supreme Court exhaustively reviewed the constitutional controversy surrounding per se statutes. The court struck down the void for vagueness challenge because the per se statute provided a precise standard of enforcement; therefore, arbitrary or discretionary enforcement was eliminated.<sup>90</sup> Whether or not a person has fair notice of the proscribed conduct was addressed by the California court in terms of what an ordinary person should perceive from drinking alcohol, i.e., if a person has consumed a substantial amount of alcohol, he should know he is in jeopardy of violating the statute.<sup>91</sup>

Under present Montana statutes, a suspected drunk driver who submits to a chemical test can be charged under both the traditional DUI charge and the per se offense. He may be convicted, however, on only one charge.<sup>92</sup> A conviction of either offense will have the same result for purposes of the administrative sanction of driver's license suspension or revocation.<sup>93</sup> Any combination of per se and DUI convictions within a five year period will have a cumulative effect resulting in a one year driver's license revocation.<sup>94</sup>

---

87. *City of Seattle v. Urban*, 32 Wash. App. 634, 637, 648 P.2d 922, 924 (1982).

88. *Id.* at 637, 648 P.2d at 925.

89. 35 Cal. 3d 257, 673 P.2d 732, 198 Cal. Rptr. 145 (1983).

90. *Id.* at 269-70, 673 P.2d at 740, 198 Cal. Rptr. at 152.

91. *Id.* at 270-72, 673 P.2d at 740-42, 198 Cal. Rptr. at 152-54. The court noted that it requires more than a small amount of alcohol to produce a BAC of 0.10%. A 160 pound person would have to drink three to four average drinks in a one hour period to reach this level. *Id.*

92. MONT. CODE ANN. § 61-8-408 (1983). If both charges are presented to a jury, it is important that the jury verdict form clearly indicate the separateness of the offenses. The jury should be instructed on the necessity to denominate which offense, if any, it believes the defendant has committed.

93. A first conviction of DUI or per se results in a six month driver's license suspension. A second conviction on either charge within five years of the previous violation will result in a one year revocation. MONT. CODE ANN. § 61-5-208(2) (1983). Per se and DUI convictions also accumulate the same number of "points" toward an adjudication that a driver is an habitual traffic offender. MONT. CODE ANN. § 61-11-203(2)(d) (1983).

94. The Motor Vehicle Division has adopted this position based on its interpretation of MONT. CODE ANN. § 61-5-208(2) (1983). This statutory construction is being challenged presently in at least two district courts. Telephone interview with James Scheier, Montana Attorney General's Office (Dec. 17, 1984).

### F. Admissibility of Evidence

The 1983 Montana legislators attempted to ease the admissibility requirements of certain forms of documentary evidence connected with DUI and per se prosecutions. The purpose of this proposal was to reduce the burden placed on state crime laboratory technicians who were required to travel all over the state to testify in DUI trials.<sup>95</sup>

The new legislation provides that a Department of Justice laboratory analysis report of blood, breath, or urine or the report of a law enforcement officer who conducted a breath test and verified the results of that test, can be introduced in the prosecution's case-in-chief without the testimony of the person who prepared the report or performed the test.<sup>96</sup> The present statute<sup>97</sup> indicates that a chemical analysis report complying with statutory requirements<sup>98</sup> is admissible evidence to prove a defendant's BAC.

This admissibility provision has particular significance in a per se prosecution because the state generally only has to produce the arresting officer.<sup>99</sup> The responsibility<sup>100</sup> to subpoena the laboratory technician is then on the defendant. The defendant may or may not choose to call the technician depending on the credibility of the testing procedure and its results. In a traditional DUI prosecution, when the BAC is close to 0.10%, it would be advisable for the prosecution to call the laboratory technician as an expert witness

95. *Hearings H.B. 540 Before Senate, supra* note 6 (Mar. 22, 1983) (statement of Jim Nugent). Arnold Melnikoff, state crime laboratory technician, complained to the Montana Supreme Court in October of 1977 about the costly administrative burden that was placed on the resources of the laboratory due to the evidentiary requirements of having the chemist's actual presence at a DWI trial. Letter from Arnold B. Melnikoff to Ray Stewart, court administrator of the Montana Supreme Court (Oct. 7, 1977).

96. H.B. 540, 48th Leg. § 5 (codified at MONT. CODE ANN. § 61-8-404(1)(b) (1983)). Also, any report prepared by a laboratory either certified by or exempt from certification would be admissible. *Id.* See MONT. ADMIN. R. §§ 23.3.901-941.

97. MONT. CODE ANN. § 61-8-404(1)(b) (1983).

98. If a breath test was performed by a law enforcement officer, the report must indicate that the officer performed the test according to the applicable rules of the Department of Justice. See MONT. ADMIN. R. §§ 23.3.901-941. The officer must verify the correctness of the results. If the test was of blood or urine, the report must indicate that the test was performed at the state crime laboratory or some other laboratory certified or exempted from certification. A verification of the results is desirable, but there is no statutory requirement. MONT. CODE ANN. § 61-8-404(1)(b)(i), (ii) (1983). See also *State v. McDonald*, \_\_\_ Mont. \_\_\_, 697 P.2d 1328 (1985), which sets out the foundation requirements to admit evidence of a DUI defendant's blood alcohol content and a test report.

99. The law enforcement officer's primary task is to establish the validity of the arrest. If a blood test was performed, the prosecutor must produce the person who withdrew the blood and establish his competence to do so in accordance with MONT. CODE ANN. § 61-8-405(1) (1983).

100. Presumably, this responsibility includes the expense of producing the witness.

to testify to the effects alcohol has on bodily functions and how a particular BAC will impair driving ability.

This provision is a distinct advantage in the prosecution of DUI and per se offenses.<sup>101</sup> A question remains, though, as to the power of the Legislature to enact this provision. The report, to be admissible, must fall under an exception to the hearsay rule. Rule 803(8) of the Montana Rules of Evidence is the most likely applicable exception.<sup>102</sup> In *State v. Snider*,<sup>103</sup> the Montana Supreme Court held that a written criminal laboratory report prepared by a state crime laboratory chemist, although hearsay, was admissible in evidence without the testimony of the chemist.<sup>104</sup> *Snider*, though, was decided prior to the adoption of the Montana Rules of Evidence.<sup>105</sup> As adopted, these rules specifically exclude the kind of reports<sup>106</sup> referred to in the DUI statute. Additionally, the commission comments state that *Snider* was overruled by the adoption of the rules.<sup>107</sup>

The Montana Constitution grants the Montana Supreme Court the power to adopt rules of practice and procedure.<sup>108</sup> The Legislature has a limited veto power.<sup>109</sup> Recent case law interpreting these constitutional grants of authority provides that "the legislature is empowered to veto any such rules promulgated by [the Montana Supreme Court]. However, once a legislative veto is exercised, the legislature is not empowered to fill the vacuum by enacting its own legislation . . . ."<sup>110</sup> An argument may be made, nonetheless, that because the supreme court was aware of the

101. Particularly in larger cities where there are numerous DUI and per se prosecutions, the burden on state laboratory personnel is greatest.

102. The authentication requirement could be dealt with under MONT. R. EVID. 901(b)(7), 902(2), (4), or (8).

103. 168 Mont. 220, 541 P.2d 1204 (1975).

104. *Id.* at 228, 541 P.2d at 1210.

105. The current rules were adopted by the Montana Supreme Court by Sup. Ct. Order 12729 (Dec. 29, 1976) (effective July 1, 1977).

106. MONT. R. EVID. 803(8) excludes investigative reports by police and other law enforcement personnel; investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; or a factual finding offered by the government in criminal cases. *Id.* at 803(8)(i)-(iii).

107. MONT. R. EVID. 803(8) commission comments.

108. MONT. CONST. art. VII, § 2(3).

109. The Montana Constitution provides that the Legislature may disapprove of any rule promulgated by the supreme court in the two legislative sessions following adoption of the particular rule. *Id.*

110. *Coate v. Omholt*, \_\_\_ Mont. \_\_\_, 662 P.2d 591, 600 (1983). The court noted, "[c]learly . . . Art. VII, § 2(3) vests the rule-making authority in the supreme court subject only to legislative veto. This provision changed the rules of the supreme court and the legislature." *Id.* at \_\_\_, 662 P.2d at 599.



problem<sup>111</sup> and failed to act,<sup>112</sup> the Legislature could respond and fill the void left by the court's inaction.

### G. Sentencing

A dominant theme in all of the DUI proposals to the 1983 Montana Legislature was that mandatory sentencing would deter the drinking driver.<sup>113</sup> The purpose of this legislation was to put the driver on notice that he would spend time in jail if he were convicted of DUI. Representative Vincent, the principal sponsor of the mandatory sentencing bill stated: "One day in jail is a sobering experience."<sup>114</sup> Representative Vincent noted that when he had introduced a similar proposal to the 1981 Legislature, he had trouble getting cosponsors. There was an apparent change in the attitude of his colleagues, because his 1983 proposal had thirty-five cosponsors.<sup>115</sup>

---

111. Arnold Melnikoff, in his October 7th letter, *supra* note 95, noted that before the adoption of the new rules of evidence, state chemists averaged less than two trials per month. Since the adoption of the rules on July 1, 1977, the chemists had attended 18 trials and seven trials were scheduled for the next week.

112. Ray Stewart, supreme court administrator, communicated Mr. Melnikoff's concerns to Sam Haddon, chairman of the Commission on Rules of Evidence, on November 17, 1977. Mr. Stewart's letter acknowledged that the Honorable Frank Haswell had suggested that the Commission determine if the court should take some corrective action. Letter from Ray Stewart to Sam Haddon (Nov. 17, 1977). Mr. Haddon promptly responded by sending both Mr. Melnikoff's letter and Mr. Stewart's letter to members of the Commission and asking for any recommendations for a court modification of Rule 803(8). Letter from Sam Haddon to all members of the Montana Supreme Court Commission on Rules of Evidence (Nov. 23, 1977). A draft of a proposed revised rule 803(8) was presented to the members of the Commission. The revised rule would have allowed introduction of the reports if:

- (1) the party offering the report, findings or matter serves a copy thereof, with a Notice of Intent to Introduce upon each adverse party not less than ten (10) days prior to trial, and (2) no adverse party files objection to the introduction of such report, findings or matter within five (5) days thereafter.

*Id.* (Feb. 23, 1978). A ballot for or against the new amendment to the rule was enclosed with the information on the rule change. *Id.*

According to Mr. Haddon, the proposed amendment was rejected. Mr. Haddon also indicated that there never has been a renewed effort directed at the Rules Commission to make any change in Rule 803(8) since the original change proposed in 1977. Telephone interview with Mr. Sam Haddon (Dec. 18, 1984).

113. "If this bill is strong and enforced properly, it will create an effective deterrent. Knowing you will spend one day in jail if apprehended and convicted will be a definite deterrent." *Hearings H.B. 250 Before House, supra* note 2 (Jan. 26, 1983) (statement of Representative Vincent). "[A] mandatory sentence that treats all offenders the same will have a deterrent effect." *Id.* (statement of Doris Fisher, Montanans Against Drunk Drivers [MADD]). "It would be a real deterrent for the offender to go to jail and wear the blue outfits. That would definitely be a deterrent." *Id.* (statement of Betty Wing). "[T]he public wants a deterrent . . ." *Id.* (Feb. 16, 1983) (statement of Representative Keyser).

114. *Hearings H.B. 250 Before House, supra* note 2 (Jan. 26, 1983) (statement of Representative Vincent).

115. *Id.*

A primary concern of many of the legislators was the added burden that the taxpayer would bear as a result of mandatory sentencing. In particular, the problem of jail overcrowding would have to be addressed by local governments.<sup>116</sup> There was general agreement among the legislators that some form of mandatory jail time legislation should be passed. The contentious issue was how and when the jail sentence was to be served. The twenty-four hour term for a first conviction of DUI received little opposition. After considerable debate,<sup>117</sup> a compromise position was reached that requires a person convicted of a second or third DUI offense within five years of a prior conviction to serve at least forty-eight consecutive hours of jail time.<sup>118</sup>

Mandatory sentencing received guarded approval from members of the judiciary.<sup>119</sup> There were expressions by some judges

---

116. Representative Brown was concerned that judges would be reluctant to send offenders to jail due to overcrowding. Representative Farris observed that a bond issue for the building of a new jail in Great Falls had failed. "There comes a time when the property owner says no." *Hearings H.B. 250 Before House, supra* note 2 (Jan. 26, 1983). Representative Addy commented that the Billings jail was so overcrowded that judges were no longer sentencing people to jail because they would not be let in. *Id.* (Feb. 16, 1983). Chairman Brown expressed the view that bills like mandatory sentencing totally ignore the administrative burden put on local governments and place the local government in an impossible position. *Id.* Representative Vincent acknowledged the existence of this problem, but he expressed the view that the solution was not simply to let the guilty go free. Representative Vincent conceded, though, that the choice to expend the necessary funds would ultimately rest with the local taxpayer. *Id.* (Jan. 26, 1983). Representative Vincent indicated the Legislature might have to help out local governments. Doris Fisher, MADD, observed that "although the jails are full, so are the hospitals and the cemeteries." *Id.* Representatives Keyser and Hannah stated that it was the responsibility of the counties to face up to the problems they are having with their jails. *Id.* (Feb. 16, 1983). The concerns of the legislators were well founded. According to a United States Department of Justice study, mandatory sentencing for drunk drivers places a great strain on correctional facilities, especially during the weekends. Cimon, *Tougher DUI Laws Cause Jail Crowds, New Study Claims*, *Missoulian*, Nov. 11, 1984, at 2, col. 2. The study suggested that convicted offenders be required to help pay the costs of their confinement to ease the financial burden on local governments. *Id.*

117. The protest that emerged was not to the length of the sentences but to the mandatory consecutive time proposal. Some legislators expressed the view that, because many of the persons convicted of second and third DUI's would be working people, many would lose their jobs if they were required to serve their sentences consecutively. This result would not only affect the offender but it would affect the offender's family. A compromise position was reached which required that at least 48 hours of the jail term had to be served consecutively. Representative Darko observed that she comes from a one-industry town and if the workers are put in jail and can't work, they will be fired. *Hearings H.B. 250 Before House, supra* note 2 (Feb. 16, 1983).

118. 1983 Mont. Laws ch. 433.

119. Gladys Vance, Cascade County Justice of the Peace, expressed support for mandatory sentencing because it prevents judge shopping. She also proposed that the courts be given the power to suspend sentences for up to six months on first and second convictions of DUI. Justice Vance believed that alcohol intervention programs were not given sufficient time to work. Exhibit N, *Hearings H.B. 250 Before House, supra* note 2 (Jan. 26,

that the proposed bill encroached too broadly on judicial discretion.<sup>120</sup> Minimum jail terms are prescribed by the new sentencing statute for convictions for first, second, and third offenses of DUI.<sup>121</sup> These sentences are not subject to suspension by the judge unless the defendant fits within the parameters of the medical escape clause. This provision allows a sentencing judge to suspend the mandatory jail term for a first or second conviction. The judge is required to make a determination that the jail term poses a threat to the physical or mental well-being of the defendant.<sup>122</sup> It was suggested that written medical verification should be required to qualify for this exception,<sup>123</sup> but this proposal was not adopted. The wording of the sentencing statute suggests that a judge could

1983).

District Court Judge Joseph B. Gary of the Eighteenth Judicial District presented the following comments:

[I]n relation to DWI, I feel that a jail sentence could be a deterrent. If you jailed one lawyer for a day, every lawyer in the district would know of that and the next time the other lawyer had one too many, the thought of his colleague in jail could certainly be a deterrent to his driving, I believe. This should permeate all segments of society, a carpenter, a fireman, a doctor, a teacher, ad infinitum . . .

[This bill] will be a possible step forward in deterring continued carnage. For this reason I advocate the passage of House Bill No. 250.

*Hearings H.B. 250 Before Senate, supra* note 2 (Mar. 9, 1983).

120. Myron Pitch, a city judge, opposed the legislation: "If the tools are taken away from the judges, they will have no control over the people." Pitch was concerned that rehabilitation was not being considered. *Hearings H.B. 250 Before House, supra* note 2 (Jan. 26, 1983). Mike McCabe, a justice of the peace, opposed the bill because it didn't go far enough. "24 hours in jail is nothing." *Id.* Marcel Turcotte, representing the Montana Magistrates Association, explained that he fought the bill in the House because "it takes away the judge's discretion in sentencing." *Hearings H.B. 250 Before Senate, supra* note 2. A contrary view was expressed by Representative Hannah. He strongly criticized the judicial attitude of some judges who apparently stated they were not going to obey the law and they were not going to put people in jail. Representative Hannah noted that the Legislature had already killed a bill which would have chastized judges for not sentencing convicted persons according to the criminal statutes. Hannah contended that it was the responsibility of the Legislature to decide whether sentencing requirements should be enacted and it was then the responsibility of the judge to sentence people according to the law. *Hearings H.B. 250 Before House, supra* note 2 (Feb. 16, 1983).

121. See MONT. CODE ANN. § 61-8-714(1), (2), (3) (1983). Three days of the mandatory seven days for a second DUI conviction must be served. Ten days of the mandatory 30 days for a third DUI conviction must be served if the offense occurred within five years of the first offense. *Id.* at § 61-8-714(2), (3).

122. MONT. CODE ANN. § 61-8-714(1), (2) (1983). The statute makes no provision for a medical exception for a third conviction. Rather, on a third conviction, at least 10 days of the sentence "may not be deferred or suspended." *Id.* at § 61-8-714(3).

123. Betty Wing suggested that the sentencing statute should be amended to provide that the jail sentence could be dismissed only if the offender had written verification from a licensed physician or psychologist that the offender qualified under the medical escape clause. Ms. Wing stated the opinion that the medical clause was overused. *Hearings H.B. 250 Before House, supra* note 2 (Jan. 26, 1983).

give a first or second time offender a deferred sentence.<sup>124</sup> This judicial action would clearly defeat the deterrent aspects of mandatory sentencing envisioned by the Montana legislators.

There was disagreement among the legislators over whether a first conviction of a per se violation should carry a mandatory sentence. As introduced, there was no mandatory jail time.<sup>125</sup> Representative Ramirez opposed mandatory sentencing for at least a first conviction of per se. He felt that traditional DUI and per se are separate and distinct crimes and therefore should be treated as such. Because a traditional DUI charge requires proof that the defendant's driving ability was actually affected, Ramirez contended that a DUI offense should have a more severe penalty than per se where no behavioral threshold must be met.<sup>126</sup> Representative Ramirez prevailed and no mandatory sentence is required for a first conviction of per se.<sup>127</sup>

Due to the sentencing disparity between DUI and per se, a degree of latitude may be exercised by the prosecution in plea bargain negotiations. If chemical test results indicate a BAC of 0.10% or greater, in many cases it would be to the advantage of both the defense and the prosecution to enter and accept a plea of guilty to the per se violation.<sup>128</sup> A prosecutor who does not have the advantage of chemical test results should be wary of this plea bargain arrangement.<sup>129</sup>

---

124. The sentencing statute provides that 10 days of the sentence for a third conviction of DUI "may not be deferred." *Id.* at § 61-8-714(3). No prohibition against deferred sentences is specifically set out for first or second convictions. *Id.* at § 61-8-714(1), (2).

125. H.B. 540, 48th Leg., § 6 (introduced bill). An attempt was made to amend the bill to provide for a 24 hour minimum sentence for a first conviction. The rationale for the mandatory sentence was that a law enforcement officer could be put in a compromising position if he had to choose between charging DUI or per se. Also, if no facilities for obtaining a chemical sample from a suspected drunk driver were available to the law enforcement officer, the officer's only recourse would be to charge traditional DUI. In this circumstance, the defendant might be subject to jail time simply because no chemical test could be performed. Colonel Robert Landon, Montana Highway Patrol, contended that discretion to charge DUI or per se should be on the county attorney or the judge, not on the officer. *Hearings H.B. 540 Before House, supra* note 2 (Apr. 5, 1983).

126. *Hearings H.B. 250 Before House, supra* note 2 (Feb. 17, 1983). Representative Ramirez observed that if the penalties for DUI and per se were the same, there would be no incentive to prosecute for DUI whenever a chemical test is performed. *Id.*

127. See MONT. CODE ANN. § 61-8-722(1) (1983). Mandatory jail terms are provided for second (not less than 48 hours or more than 30 days) and third (not less than 48 hours or more than six months) convictions of per se. *Id.* at § 61-8-722(2), (3).

128. The prosecution is relieved of the administrative burden of prosecuting the case and the defendant would not necessarily have to serve any jail time.

129. If no chemical test results are available and the DUI charge has been dismissed, the defendant may renege on the bargain and plead innocent to the per se charge. The prosecution then would have no evidence to proceed and would have to dismiss the per se charge.

A defendant who has been convicted of either per se or DUI must complete an alcohol information course in addition to any other sentence imposed.<sup>130</sup> Unlike the civil administrative procedure of driver's license suspension or revocation,<sup>131</sup> DUI and per se convictions cannot be combined to increase the penalty, i.e., a per se conviction and a DUI conviction within five years is not two DUI convictions for purposes of sentencing.<sup>132</sup> DUI and per se convictions cumulate the same number of points toward an adjudication of habitual traffic offender.<sup>133</sup>

#### IV. CONCLUSION

There is no easy solution to the problem of drinking and driving. Because there has been a long history of societal tolerance of this problem, effective change will be slow. Spurred by federal monetary incentives and pressure from state agencies and concerned citizen groups, the 1983 Montana Legislature passed major revisions to Montana's DUI laws. This legislative reaction to the drinking driver, however, should be viewed only as a starting point in the battle to rid Montana's roadways of the menace of the intoxicated vehicle operator. The executive and judicial branches of state and local government now must be willing to follow the lead of this legislative mandate. A commitment to a long range comprehensive approach, combining education and treatment with enforcement and prosecution, is the type of positive response the 1983 Montana Legislature envisioned to deal with the alcohol impaired driver.

---

A suggested procedure, in this situation, is to require the defendant to complete an affidavit in which he admits to the amount of alcohol consumed in a particular time period. Also, the defendant would admit that his ability to safely operate a motor vehicle was impaired by his consumption of alcohol. Finally, the defendant would admit that he believed he was under the influence of alcohol. With this affidavit in hand, the prosecutor could dismiss the DUI charge and settle for a per se guilty plea.

130. MONT. CODE ANN. §§ 61-8-714(4), -722(5) (1983).

131. There appears to be a conflict in the Montana codes on what effect a DUI or per se conviction will have on the offender's driver's license. MONT. CODE ANN. § 61-5-205 (1983) provides that the motor vehicle division "shall revoke the license . . . of any operator . . ." who has been convicted of DUI or per se. *Id.* (emphasis added); *id.* at § 61-5-205(2). MONT. CODE ANN. § 61-11-101(2) (1983) allows the motor vehicle division to "issue a restricted probationary license in lieu of the suspension required in 61-5-208(2)." *Id.* To fall within this provision, the court which had jurisdiction of the DUI or per se charge must recommend the issuance of the license and the offender must attend a driver improvement or alcohol treatment school. *Id.*

132. This is consistent with the rationale that DUI and per se are separate and distinct offenses.

133. See MONT. CODE ANN. § 61-11-203(2)(d) (1983).